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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANTONIO WAYNE REDDICK,<br><br>Defendant and Appellant. | C086057<br><br>(Super. Ct. No. 13F07409) |

Defendant Antonio Wayne Reddick side-swiped a van stopped at a Sacramento intersection waiting for the traffic signal to change. Rather than exchange information with the van's driver, defendant took off, running two red lights before crashing into another car entering another intersection. The broadside collision claimed the lives of defendant's two passengers and caused serious injury to the driver of the other car.

Following a jury trial, defendant was convicted of two counts of gross vehicular manslaughter while intoxicated, one count of driving under the influence of alcohol and/or drugs causing injury, one misdemeanor count of hit and run with damage to

property, and one misdemeanor count of driving without a valid driver's license. The trial court sentenced defendant to a lengthy third strike sentence.

Defendant appeals, challenging the denial of a pretrial motion to suppress warrantless blood draw evidence, the sufficiency of the evidence of driving under the influence, and the denial of a motion for discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). Defendant also challenges his sentence as cruel and unusual, and argues the trial court erred in calculating custody credits. Defendant additionally argues remand is necessary to allow the trial court to exercise its newly granted discretion under Senate Bill No. 1393 to strike a prior serious felony conviction enhancement under Penal Code section 667, subdivision (a),[1] consider whether defendant would benefit from mental health diversion under section 1001.36, and determine defendant's ability to pay fines and assessments pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

We conditionally reverse the judgment and remand for the trial court to conduct a mental health eligibility hearing and exercise its discretion whether to strike the prior serious felony conviction enhancement pursuant to section 667, subdivision (a). Additionally, though neither party raises the issue, we have identified a sentencing error in the oral pronouncement of judgment; namely, that the trial court improperly severed a great bodily injury enhancement from the count (driving under the influence of alcohol and/or drugs causing injury) to which it was attached. Accordingly, we shall also remand for resentencing on the great bodily injury enhancement. In all other respects, we affirm.

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[1] Undesignated statutory references are to the Penal Code.

## I. BACKGROUND

*A. The Accident*

A.P. was waiting for a traffic signal at the intersection of Madison and Date Avenues on November 4, 2013, at 10:50 p.m. As she waited for the light to change, a red Neon struck the side of her van while attempting to squeeze between lanes of traffic. The Neon ran the red light and drove down Madison Avenue. A.P. followed in an attempt to obtain the Neon's license plate number.

The Neon turned right onto Auburn Boulevard and pulled over to the side of the road. A.P. pulled in behind, and the Neon took off at high speed. A.P. watched as the Neon ran another red light and slammed into a blue Camry entering the intersection on a green light from the Interstate 80 off-ramp. The Camry went into a ditch. The Neon, which was either smoking or aflame, crashed into a tree.

Paramedics and police officers arrived at the scene and found defendant in the Neon's driver's seat. A woman, later identified as Cherion Robinson, was unresponsive in the front passenger seat. A man, later identified as Gregory Hunt, was lying on the grass nearby, having been helped from the backseat by good Samaritans concerned about the smoking vehicle. Robinson was pronounced dead at the scene. Hunt died as a result of injuries sustained in the crash several days later. The driver of the Camry suffered five broken ribs, a punctured lung, and a dislocated shoulder.

Defendant was extricated from the Neon and placed on a backboard with a cervical collar. Paramedic Joshua Thompson observed that defendant was alert and oriented, but combative. He noted that defendant was trying to rip off his cervical collar and resisting attempts to administer an IV. Thompson wrote, "positive ETOH" in his patient care report, meaning positive for alcohol. During the trial, Thompson testified he would have made such a notation in response to either an admission or an odor of alcohol.

Defendant was transported to Mercy San Juan Hospital. Officer John Tennis of the Sacramento Police Department made contact with defendant in the trauma room. When Tennis arrived, defendant was strapped to a gurney, yelling, and attempting to kick medical personnel who were trying to help him. Defendant was so combative that Dr. David Beffa, the attending trauma surgeon, was unable to assess him. However, Dr. Beffa observed that defendant's speech was slurred. Dr. Beffa later explained that defendant's combativeness and slurred speech could have been a reaction to polysubstance abuse. Dr. Beffa ordered sedation to calm defendant down.

Defendant was briefly sedated. When he awoke, he began kicking with such force that Officer Tennis found it necessary to climb on top of the gurney to restrain his legs. Dr. Beffa then gave an order to intubate him, a measure Dr. Beffa would later describe as a "last resort" for patients so combative that medical personnel would otherwise not be able to care for them.

Dr. Beffa examined defendant, who was now unconscious, and determined that he needed surgery for a fractured ankle with exposed bone. A CAT scan showed no evidence of any trauma to defendant's brain.

Defendant's blood was drawn at 12:29 a.m., while he was under sedation. A toxicology screening test conducted at the hospital was positive for alcohol, THC, and methamphetamine. Defendant's blood was later tested by the Sacramento County District Attorney's Office. The tests showed that defendant's blood alcohol level was .09 percent. Defendant's blood also contained Delta-nine THC, the active ingredient in marijuana, at a concentration of 8.9 nanograms per milliliter, and less than .05 milligrams per liter of methamphetamine.

*B. The Charges and Trial*

Defendant was charged in a fourth amended information with two counts of gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)—counts 1 and 2), one count of driving under the influence of alcohol and/or drugs causing injury (former Veh. Code,

§ 23153, subd. (a)—count 3), one count of driving with a blood alcohol level greater than 0.08 percent causing injury (Veh. Code, § 23143, subd. (b)—count 4), one count of misdemeanor hit and run with damage to property (Veh. Code, § 20002, subd. (a)—count 5), and the infraction of driving without a valid driver's license (Veh. Code, § 12500, subd. (a)—count 6). As to counts 3 and 4, the information alleged that defendant personally inflicted great bodily injury on the driver of the Camry. (§§ 12022.7, subd. (a) & 1192.7, subd. (c)(8).) The information further alleged that defendant had suffered a prior serious felony conviction (§ 667, subd. (a)), and two prior strike convictions. (§§ 667, subd. (e)(2) & 1170.12, subd. (e)(2)). Defendant pled not guilty and denied the enhancement allegations.

The matter was tried to a jury in May 2017. The central issue at trial was whether defendant was under the influence of alcohol and/or drugs at the time of the collision. In addition to the evidence described above, the prosecution relied on expert testimony concerning the effects of alcohol and marijuana on the ability to operate a motor vehicle.

Criminalist Chris Fogelberg testified as an expert in forensic alcohol analysis and the effects of alcohol on a person's ability to operate a motor vehicle. Fogelberg opined that a man of defendant's height and weight with a blood alcohol level of .09 percent would be too impaired to drive safely. However, Fogelberg acknowledged on cross-examination that, in order to extrapolate that person's blood alcohol level at 10:55 p.m. (the time of the collision) from his blood alcohol level at 12:29 a.m. (the time of the blood draw), he would have to assume that the alcohol was fully absorbed in the person's blood stream at the time of the collision. And, Fogelberg allowed, there was no way to know whether alcohol was fully absorbed without knowing that person's drinking pattern, which Fogelberg had not been asked to consider.

Criminalist Craig Triebold testified as an expert in forensic alcohol analysis, forensic toxicology, and the effects of alcohol and drugs on a person's ability to operate a motor vehicle. Triebold analyzed defendant's blood sample and opined that defendant

was a habitual user of marijuana, who probably ingested the drug within four to six hours of the time the sample was collected. Triebold was unable to draw any conclusions as to when defendant might have ingested methamphetamine, but noted that a concentration of less than .05 milligrams per liter is "fairly low."

Triebold explained that marijuana use may cause altered judgment and perception, slowed reaction times, and problems with information processing and multitasking, all of which can negatively affect a person's ability to drive safely. However, Triebold acknowledged that he could not draw definitive conclusions about a person's ability to drive from THC concentrations in the blood. Unlike alcohol, Triebold said, there is no linear correlation between blood concentration of THC and degree of impairment, and consequently, no consensus has emerged as to a concentration above which a person may be presumed impaired. (Cf. Veh. Code, § 23610.)

When asked how the combination of marijuana and alcohol would affect a person's ability to safely operate a motor vehicle, Triebold responded, "I would say, based on my training and experience, a person with a .09 percent blood alcohol concentration, that alone I would expect to impair their driving, such that I don't believe they would be safe to operate a vehicle. There's a lot of research on the combination of alcohol and marijuana use in particular, that fairly consistently has shown that that combination is particularly troublesome; that even low alcohol concentrations combined with marijuana use, when put together, can cause a much greater magnitude of impairment that more closely resembles a much higher alcohol concentration." "So, again," Triebold added, "the .09 blood alcohol on its own, I would say this person would be impaired for driving. Certainly, in combination with marijuana use, I would say that would further solidify that opinion." Given a hypothetical based on the facts of the case, Triebold opined that a person with a blood alcohol level of 0.09 percent, who had also consumed marijuana, would be impaired for the purposes of driving.

*C. The Verdict and Sentence*

The jury reached a verdict after one day of deliberation. As indicated above, the jury found defendant guilty of two counts of gross vehicular manslaughter while intoxicated, one count of driving under the influence of alcohol and/or drugs causing injury, one count of misdemeanor hit and run with damage to property, and one misdemeanor count of driving without a valid driver's license. The jury was unable to reach a verdict on count 4, driving with a blood alcohol level greater than .08 percent causing injury, and the trial court declared a mistrial on that count. With respect to count 3, the jury found true the allegation that defendant personally inflicted great bodily injury on the driver of the Camry. In a bifurcated trial, the jury also found true defendant's prior serious felony conviction and two prior strike convictions.

Defendant appeared for sentencing on December 1, 2017. Prior to sentencing, defendant filed a motion to strike one of the prior strike convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).[2] The trial court denied the motion, stating, inter alia, "I see from his history and the conduct in this case a recklessness in [defendant] and inability to control his conduct, which causes me to believe that he poses a danger to the community." The trial court continued, "I will also note that he has failed to successfully complete probation and parole in the past, so that the leniency of having been placed on supervision and past incarcerations seems to have done little to impress upon [defendant] the need to change his ways." The trial court concluded, "Further, the defense has provided me with no additional information concerning the defendant, his life, what he does, job training he may have undertaken, substance abuse treatment he may have completed or anything else in mitigation that might [allay] the [c]ourt's concerns that he constitutes a danger." Accordingly, the trial

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[2] Defendant also filed a motion regarding the "strike status" of counts 1 and 2, which is not relevant to any issue on appeal.

court concluded that defendant's criminal history placed him within the spirit of the Three Strikes law.

The trial court then considered the sentencing objectives set forth in California Rule of Court, rule 4.410, stating, "Among the factors I find most compelling is protecting society, punishing the defendant, deterring the defendant and others from criminal conduct by demonstrating consequences, and preventing the defendant from committing new crimes by isolating him for a period of incarceration." The trial court found that, "the crimes in this case involve a high degree of callousness, that the defendant has engaged in violent conduct indicating that he constitutes a danger to society, that he was on parole when he committed these offenses, that he has served several prior prison terms, and that his prior convictions as an adult and sustained petitions as [a] juvenile are numerous." Although the trial court found that defendant was remorseful, and enjoyed some degree of community support, the court stated, "I fear, however, that the support seems to not have helped him much in the past, and my concern remains that he does constitute a danger." Accordingly, the trial court selected a midterm sentence of six years for count 1, doubled for the strike, with a consecutive one-third the midterm of two years, doubled, for count 2, resulting in a total sentence of 16 years for counts 1 and 2, before enhancements. The trial court then sentenced defendant to an indeterminate sentence of 25 years to life for count 3. Although the great bodily injury enhancement was attached to count 3, the trial court added three years for the great bodily injury enhancement to the sentence for counts 1 and 2, together with five years for the prior serious felony enhancement, resulting in a purported "aggregate determinate sentence of 24 years, followed by an indeterminate sentence of 25 years to life." The trial court imposed various fines, fees, and assessments (described below), without objection. This appeal timely followed.

## II. DISCUSSION

*A. Motion to Suppress*

Prior to trial, defendant brought a motion to suppress his blood test results, arguing they were the result of an illegal search and seizure. The trial court conducted an evidentiary hearing (described below) and denied the motion, finding that exigent circumstances justified the warrantless blood draw. Defendant argues the trial court's ruling was erroneous because the prosecution failed to establish exigent circumstances. We disagree.

*1. Additional Background*

The hearing on the motion to suppress centered around the testimony of Officer Tennis, who ordered the blood draw.[3] Tennis contacted defendant in the trauma room. Upon arriving, he observed that defendant was not cooperating with medical personnel, but was instead "yelling and kind of flailing about." Although defendant's arms were strapped to a gurney, Tennis recalled that he was still trying to move them. Defendant was also kicking.

Defendant was briefly sedated. When he awoke, Tennis said, "he got more upset." Tennis recalled that defendant struggled so violently that he climbed on top of the gurney to hold his legs down. Defendant was then given another round of sedation, which rendered him unconscious.

Tennis learned that defendant was on parole. He also learned that defendant was being readied for surgery for trauma to the right ankle and possible internal bleeding. He became concerned that he would soon lose the opportunity to obtain "a noncontaminated

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[3] The prosecution also relied on the testimony of Officer Michael Macias of the California Highway Patrol and Officer Paul Fong of the Sacramento Police Department, both of whom testified that they responded to the scene of the accident and observed defendant being uncooperative or combative with first responders.

felony blood sample." Accordingly, Tennis asked a member of the hospital's staff, who was already drawing blood for diagnostic purposes, to draw two additional vials for use in his investigation. Tennis later learned that the hospital's toxicology report showed that defendant had unspecified amounts of alcohol, THC, and methamphetamine in his blood stream. Tennis was not aware of the results of defendant's toxicology screen at the time of the blood draw.

Following argument, the trial court denied the motion. The trial court assumed without deciding that defendant's status as a known parolee would not justify a warrantless blood draw.[4] The trial court acknowledged the absence of evidence of objective signs of alcohol intoxication, but emphasized the seriousness of the accident, noting that defendant's car was wrapped around a tree, and one passenger (Robinson) was already dead, and another (Hunt) was in serious distress at the time of the blood draw. As for defendant, the trial court continued, he "was in medical stress and behaving in a way that could be the result of pain, could be the result of substances, could be the result of both." Under the circumstances, the trial court concluded, "there's at least reasonable suspicion that substances might be involved in the mix here, and I think the indication that a surgery was imminent and the defendant was being prepped for surgery is a sufficient exigent circumstance under these circumstances to justify the taking of the sample without trying to obtain a warrant."

*2. Analysis*

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures. (U.S. Const., 4th Amend.) Blood draws are searches under the Fourth Amendment. (*Schmerber v. California* (1966) 384 U.S. 757, 767 (*Schmerber*); *People v. Meza* (2018) 23 Cal.App.5th 604, 610 (*Meza*).)

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[4] We have not been provided with any information about defendant's parole conditions.

Warrantless searches are per se unreasonable, subject only to a few " 'specifically established and well-delineated exceptions.' " (*People v. Woods* (1999) 21 Cal.4th 668, 674.) One such exception arises when exigent circumstances require prompt official action. (*Birchfield v. North Dakota* (2016) 579 U.S. __, [136 S.Ct. 2160, 2173, 195 L.Ed. 560] (*Birchfield*) ["The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant"]; see also *Missouri v. McNeely* (2013) 569 U.S. 141, 149 (*McNeely*) [the exception arises when exigent circumstances create a " 'compelling need for official action and no time to secure a warrant' "].) For example, the exigent circumstances exception permits the warrantless entry onto private property when there is an urgent need to provide aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence. (*Kentucky v. King* (2011) 563 U.S. 452, 460.)

When a defendant files a motion to suppress evidence seized in a warrantless search, "the prosecution bears the burden to prove police conducted the search under a valid exception to the Fourth Amendment's warrant requirement." (*People v. Espino* (2016) 247 Cal.App.4th 746, 756.) On appeal from the denial of a motion to suppress, we defer to the trial court's express or implied factual findings if supported by substantial evidence, but independently apply constitutional principles to the trial court's factual findings in determining the legality of the search. (*People v. Redd* (2010) 48 Cal.4th 691, 719.) Here, the underlying facts are not in dispute. Therefore, we need only inquire whether the facts establish exigent circumstances excusing the absence of a warrant.

The U.S. Supreme Court has considered the extent to which drunk driving may present an exigent circumstance justifying a nonconsensual warrantless blood draw in several cases. In *Schmerber*, the defendant was hospitalized following an automobile accident. (*Schmerber, supra,* 384 U.S. at pp. 758-759.) A police officer noticed signs of intoxication, both at the scene of the accident and later at the hospital. (*Id.* at pp. 768-769.) The officer ordered a blood draw to measure the defendant's blood alcohol content.

(*Id.* at pp. 758-759.) The defendant challenged the blood test as an unreasonable search under the Fourth Amendment. (*Ibid.*) The court cautioned that search warrants are "ordinarily required . . . where intrusions into the human body are concerned." (*Id.* at p. 770.) Nevertheless, the court concluded that, under the "special facts" of that case, where time had already been lost taking the defendant to the hospital and investigating the accident, the officer "might reasonably have believed that he was confronted with an emergency" that left no time to seek a warrant because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops." (*Id.* at pp. 770; see *id.* at pp. 771-772.) Accordingly, the court found no Fourth Amendment violation. (*Id.* at p. 772.)

Decades later, in *McNeely*, the high court clarified that the natural dissipation of alcohol from the bloodstream does not constitute a per se exigency justifying warrantless, nonconsensual blood draws in drunk driving cases. (*McNeely, supra,* 569 U.S. at p. 156.) There, a police officer stopped the defendant for a traffic violation and observed several signs of intoxication. (*Id.* at p. 145.) The defendant performed poorly on field sobriety tests and refused to provide a breath sample. (*Ibid.*) The officer took the defendant to the hospital, where he refused a blood test. (*Id.* at p. 146.) The officer then directed a technician to take a blood sample over the defendant's objection, without trying to obtain a warrant. (*Ibid*.) The defendant successfully moved to suppress the results of the blood test, and the Supreme Court affirmed, holding that the natural dissipation of alcohol in the blood stream is not a per se exigency justifying warrantless blood draws in every drunk driving case. (*Id.* at p. 165.)

The court explained that the natural dissipation of alcohol in the blood is one circumstance to consider when evaluating exigency, but there may be other circumstances showing the warrant process would not cause a significant delay in the performance of the blood test, and when "officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." (*McNeely, supra,* 569 U.S. at

p. 152.) For example, the circumstances might show that more than one officer was on hand, such that one officer could take steps to secure a warrant while another transports the suspect to a medical facility. (*Id.* at p. 153.) Similarly, the circumstances could show that electronic communications and streamlined procedures are available to process warrant applications for drunk-driving investigations quickly. (*Id.* at pp. 154-155.)

At the same time, the court acknowledged that warrant applications "inevitably take some time," and "improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest." (*McNeely*, *supra*, 569 U.S. at p. 155.) The court also recognized that "a significant delay in testing will negatively affect the probative value" of a blood test. (*Id.* at p. 152.) The court explained: "While experts can work backwards from the [blood alcohol content] at the time the sample was taken to determine the [blood alcohol content] at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process." (*Id.* at p. 156.) "In short," the court concluded, "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." (*Ibid.*)

More recently still, the court considered the application of the exigent circumstances exception to warrantless blood tests on unconscious persons believed to have been driving under the influence. (*Mitchell v. Wisconsin* (2019) __ U.S. __ [139 S.Ct. 2525, 204 L.Ed. 2d 1040] (*Mitchell*).) There, the defendant was arrested for drunk driving and transported to the police station. (*Id.* at p. 2532.) On the way, the defendant, already too intoxicated for field sobriety tests, grew so lethargic that he was unable to perform a breath test. (*Ibid.*) The officer drove the defendant to a nearby hospital for a

blood test. (*Ibid.*) The defendant lost consciousness en route and remained unconscious while the sample was taken. (*Ibid.*) A plurality of the court concluded the exigent circumstances rule "almost always" permits a warrantless blood test of unconscious drivers. (*Id.* at p. 2531.) The plurality explained: "exigency exists when (1) [blood alcohol content] evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." (*Id.* at p. 2537.) In the plurality's view, both factors are met when a drunk-driving suspect is unconscious. (*Ibid.*) Accordingly, the plurality concluded: "When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's [blood alcohol content] without offending the Fourth Amendment." (*Id.* at p. 2539.)

From these cases, we gather that exigent circumstances exist when the natural dissipation of alcohol from a person's bloodstream combines with "some other factor" to create an urgent need for immediate action that makes obtaining a warrant impractical. (*Mitchell, supra,* 139 S.Ct. at p. 2537; see *McNeely, supra,* 569 U.S. at p. 153.) We next consider whether the natural dissipation of alcohol from defendant's bloodstream, combined with his imminent need for surgery, created an exigency in the circumstances of this case.

"To determine whether a law enforcement officer faced an emergency that justified acting without a warrant," we look "to the totality of circumstances." (*McNeely, supra,* 569 U.S. at p. 149.) " ' " 'There is no ready litmus test for determining whether [exigent] circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers.' " ' " (*People v. Ovieda* (2019) 7 Cal.5th 1034, 1041; see also *People v. Duncan* (1986) 42 Cal.3d 91, 97-98 [" 'As a general rule, the reasonableness of an officer's conduct is dependent upon the existence

of facts available to him at the moment of the search or seizure which would warrant a man of reasonable caution in the belief that the action taken was appropriate' "].)

Here, Officer Tennis was aware that a serious accident had occurred, which left one of defendant's passengers dead and another seriously injured. When Tennis arrived in the trauma room, defendant was "yelling and kind of flailing about," raising a reasonable inference he was under the influence of something. By the time of the blood draw, the police investigation had already been delayed for more than an hour as defendant was transported to the hospital and subdued. Officer Tennis was informed that defendant would soon undergo emergency surgery for trauma to his ankle and possible internal injuries, leading to further delays. It was then that Tennis decided to proceed without a warrant. We cannot say that Tennis acted unreasonably in the totality of the circumstances.

Defendant's surgery could have taken hours, during which time the concentration of alcohol in his bloodstream would continue to decline. (*McNeely, supra,* 469 U.S. at p. 152.) Surgery also raised the possibility that other substances might be introduced into defendant's bloodstream, such as intravenous fluids, analgesics, or blood transfusions. Any of these things could have raised doubts about the reliability of the blood test. Under the circumstances, Officer Tennis reasonably believed he needed to act quickly lest vital evidence be lost.

*Meza*, on which defendant relies, does not compel a contrary conclusion. There, the investigating officer spoke with the defendant at the scene of the accident, observed objective signs of alcohol intoxication, and determined that he should be arrested for driving under the influence. (*Meza, supra,* 23 Cal.App.5th at pp. 606-607.) The defendant was then transported to the hospital in an ambulance, which the officer followed. (*Id.* at p. 607.) At the hospital, the officer communicated with the family of the defendant's passenger, engaged in casual conversation with the defendant, and occupied herself with paperwork. (*Id.* at pp. 611-612.) She then directed a phlebotomist

to perform a warrantless blood draw. (*Ibid.*) She did not attempt to prepare a warrant application or enlist assistance from another officer to do so. (*Id*. at p. 612.) Under the circumstances, the court found that the prosecution failed to establish an exigency.

Here, though numerous officers responded to the scene of the accident, none appears to have developed probable cause to suspect defendant of driving under the influence until Officer Tennis arrived at the trauma room, alone, sometime later. Far from suggesting that officers could have applied for a warrant, but failed to do so, the record before us suggests that Tennis arrived at the trauma room by himself, participated in an extraordinary effort to subdue defendant (giving rise to probable cause), and then learned that defendant required immediate surgery, all in short order, in the middle of the night. Unlike the investigating officer in *Meza,* Tennis had no probable cause for a warrant before arriving at the hospital, and no opportunity to obtain one afterwards.

The present case more closely resembles *People v. Toure* (2015) 232 Cal.App.4th 1096, on which the People rely. There, the investigating officer responded to the scene of the accident and contacted the defendant in the cab of his truck, which smelled of alcohol. (*Id.* at p. 1100.) The defendant was angry and combative, both at the scene, and later, at the California Highway Patrol station, where he was subjected to a nonconsensual, warrantless blood draw. (*Id.* at pp. 1098, 1101.) The court found the defendant's combative behavior delayed the police investigation, prevented officers from conducting field sobriety tests, or learning when he consumed his last drink, and threatened the destruction of blood alcohol evidence. (*Id.* at pp. 1104-1105.) Based on the totality of the circumstances, the court concluded: "The situation facing the officers was not one in which the sole consideration was the natural dissipation of alcohol in the blood as the sole basis for finding an exigency. Instead, the delays involved in obtaining a warrant . . . , the unavailability of information relating to when defendant stopped drinking, in addition to the natural dissipation of alcohol in the blood, coupled with his violent resistance, established exigent circumstances." (*Id.* at p. 1105.) Likewise, in the

present case, defendant's combative behavior and need for imminent surgery combined with the natural dissipation of alcohol in his bloodstream established an exigency justifying the warrantless blood draw. Indeed, the circumstances here were, if anything, more exigent than those in *Toure,* where the investigating officer's exigency calculation did not include the suspect's need for immediate medical intervention.

Given the totality of the circumstances, we conclude that exigent circumstances justified the warrantless blood draw. In light of our conclusion, we deem it unnecessary to reach the People's argument that the blood draw was independently justified by defendant's status as a known parolee. (Cf. *People v. Jones* (2014) 231 Cal.App.4th 1257, 1265 [nonconsensual warrantless blood draw of a defendant subject to a search condition under post-release community supervision does not offend the Fourth Amendment].)

*B. Sufficiency of the Evidence*

Defendant next challenges the sufficiency of the evidence to support the convictions for gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)—counts 1 and 2), and driving under the influence of alcohol and/or drugs causing injury (former Veh. Code, § 23153, subd. (a)—count 3). Defendant's argument begins with the observation that the jury was unable to reach a verdict on whether defendant drove with a blood alcohol level greater than 0.08 percent causing injury (Veh. Code, § 23143, subd. (b)—count 4). From this uncontroversial premise, defendant reasons that: (1) the guilty verdicts on the other DUI counts must have been based on Triebold's opinion testimony regarding the combined effects of marijuana and alcohol, about which (2) no scientific consensus has emerged, and therefore (3) the trial court should have excluded the testimony under the *Kelly/Frye* rule (*People v. Kelly* (1976) 17 Cal.3d 24, 30; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014) and/or Evidence Code sections 801 and 802. Having thus dispatched Triebold's testimony, defendant concludes that no substantial evidence supports the jury's finding that he was under the influence.

There are many problems with defendant's argument. Among the most obvious, defendant failed to object to Triebold's opinion on any of the grounds asserted here. As a result, defendant has forfeited any claim that Triebold's opinion was erroneously admitted. (Evid. Code, § 353, subd. (a); *People v. Ochoa* (1998) 19 Cal.4th 353, 414 [defendant's failure to object to scientific evidence on *Kelly/Frye* grounds in the trial court results in forfeiture of the argument on appeal]; *People v. Garlinger* (2016) 247 Cal.App.4th 1185, 1193 [defendant's failure to object to expert testimony under *Kelly/Frye* or Evidence Code §§ 801 and 802 forfeits challenges to admissibility on appeal].) Having forfeited the argument that Triebold's opinion was inadmissible, defendant cannot challenge the admissibility of the same opinion under the guise of a challenge to the sufficiency of the evidence. Because the admissibility of Triebold's opinion is, at this point, beyond question, we must take that opinion into account in considering the sufficiency of the evidence. Doing so, we conclude substantial evidence supports defendant's convictions for driving under the influence.

"In reviewing the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] '[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We ' "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Davis* (1995) 10 Cal.4th 463, 509.) "Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the jury." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) This is not such a case.

Defendant challenges only the sufficiency of the evidence that he was under the influence of alcohol or drugs at the time of the collision, an element common to his convictions for gross vehicular manslaughter while intoxicated, and driving under the influence of alcohol and/or drugs causing injury.[5] " 'To be "under the influence" within the meaning of the Vehicle Code, the liquor or liquor and drug(s) must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. [Citations.]' " (*People v. McNeal* (2009) 46 Cal.4th 1183, 1192-1193.) The prosecution may prove a defendant is "under the influence" by circumstantial evidence (*People v. Dingle* (1922) 56 Cal.App. 445, 447-

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[5] Section 191.5, subdivision (a) provides in pertinent part: "Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section . . . 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence."

Former Vehicle Code section 23153, subdivision (a), in effect at the time of the charged offenses, provided in pertinent part: "It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver."

The current version of Vehicle Code section 23153, which became effective on January 1, 2014 (Stats. 2012, ch. 753, § 5), sets forth the proscriptions against driving under the influence of alcohol, driving under the influence of drugs, and driving under the combined influence of drugs and alcohol in three separate subdivisions. (See Veh. Code, § 23153, subd. (a) [proscribing driving under the influence of alcohol], subd. (f) [proscribing driving under the influence of any drug], & subd. (g) [proscribing driving under the combined influence of drugs and alcohol].)

449, superseded by statute on another point in *People v. Weathington* (1991) 231 Cal.App.3d 69, 80 [car zigzagged, defendant staggered, talked loudly, and smelled of alcohol]) and evidence of intoxication tests. (2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 276, p. 996.)

Here, there was ample evidence from which the jury could reasonably conclude that defendant was under the influence of drugs or alcohol. A.P. testified that defendant was driving erratically, slamming into the side of her van as he attempted to squeeze into the turning lane, taking off at high speed, and running two red lights before causing the fatal collision. Paramedic Thompson testified that defendant was combative at the scene and resisted efforts to render medical assistance, leading Thompson to believe he was "positive ETOH," meaning positive for alcohol. Dr. Beffa testified that he examined defendant in the trauma room, and noted that his speech was slurred. Dr. Beffa also testified that defendant was so combative that he required two rounds of sedation, one by way of intubation, and his toxicology screen was positive for alcohol, marijuana, and methamphetamine.

Criminalist Fogelberg testified that defendant's blood sample, taken some 94 minutes after the collision, showed a blood alcohol concentration of 0.09 percent, above the level at which all persons are presumed impaired for purposes of driving. Although Fogelberg could not estimate defendant's blood alcohol concentration at the time of the accident without assuming full absorption, for which there was no evidence, there was also no evidence that defendant consumed alcohol in the period immediately following the crash. Thus, even assuming the alcohol was not fully absorbed at the time of the collision (an assumption that suggests a possible explanation for the jury's verdict on count 4), a reasonable jury could still infer that defendant was driving under the influence of alcohol. And Triebold, for his part, testified without objection that the combination of marijuana and alcohol intensifies the intoxicating effects of each, causing "a much greater magnitude of impairment that more closely resembles a much higher alcohol

concentration." Thus, there was substantial evidence from which the jury could conclude that defendant was driving under the influence of drugs and alcohol. (See *People v. Gallardo* (1994) 22 Cal.App.4th 489, 493-494 [substantial evidence supported the conclusion that defendant was driving under the influence where he "burned rubber" upon leaving a parking lot late at night, ran clearly visible stop signs, collided with another vehicle, admitted drinking two beers, and had a blood alcohol level of .03 percent].) We therefore reject defendant's challenge to the sufficiency of the evidence.

*C. Ineffective Assistance of Counsel*

Anticipating our forfeiture determination, defendant argues his trial counsel was ineffective for failing to object to Triebold's testimony under the *Kelly/Frye* rule and/or Evidence Code sections 801 and 802. We agree with the People, there was no ineffective assistance of counsel.

To establish ineffective assistance of counsel under federal and California constitutional standards, a defendant must, by a preponderance of the evidence, prove: (1) his trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) The defendant must affirmatively prove that, but for counsel's errors, defendant had a reasonable probability of a better outcome, where a " 'reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

If the record "fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Maury, supra*, 30 Cal.4th at p. 389.) Here, the record is silent as to why trial counsel failed to object to Triebold's testimony, but we need not look far for a reasonable explanation.

In *People v. Bui* (2001) 86 Cal.App.4th 1187 (*Bui*), another panel of this court concluded that the *Kelly/Frye* rule does not apply to expert testimony concerning the effects of methamphetamine on driving ability, as such testimony does not involve a novel process or new scientific technique or device. (*Id.* at pp. 1195-1196.) The *Bui* court also considered—and rejected—a challenge to the admission of the same expert's testimony under Evidence Code section 801. (*Bui, supra,* at pp. 1196-1197.) The court found no abuse of discretion in the admission of the testimony, noting the expert's opinion was based on "scientific literature, statistical data, and an epidemiological study, all of which are the type of matter that reasonably may be relied on by an expert in forming an opinion." (*Id.* at p. 1196.) To the extent that the defendant disagreed with the expert's conclusions, the *Bui* court concluded, he was free to cast doubt on them via cross-examination or rebuttal by a defense expert. (*Id.* at p. 1196.) Given our holding in *Bui*, competent counsel could reasonably determine that any objection to Triebold's testimony under the *Kelly/Frye* rule or Evidence Code sections 801 and 802 would most likely be overruled. Counsel does not render ineffective assistance by not making an objection that he or she reasonably determines would be meritless or futile. (See *People v. Lucero* (2000) 23 Cal.4th 692, 732.) Defendant has not established that his counsel acted deficiently by failing to object to Triebold's testimony. (*Strickland v. Washington, supra,* 466 U.S. at pp. 687-689.)

*D. Denial of Pitchess Motion*

Defendant contends the trial court erred in denying his *Pitchess* motion to obtain Officer Tennis's personnel records without conducting an in camera hearing. (Evid. Code, § 1043 et seq.) We review the trial court's denial of a *Pitchess* motion for abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039; accord *Riske v. Superior Court* (2016) 6 Cal.App.5th 647, 657.) We perceive no abuse of discretion here.

*1. Additional Background*

Following the denial of his motion to suppress, defendant filed a *Pitchess* motion seeking discovery of Officer Tennis's personnel records. The motion was accompanied by a declaration from defense counsel asserting that Tennis obtained defendant's blood sample without a warrant or consent. The declaration averred that Tennis had been involved in an officer-involved shooting in July 2016, nearly three years after the charged offenses. The declaration further averred that Tennis used excessive force and falsified evidence or testimony in connection with the shooting.

The trial court heard argument on the motion in March 2017. At the hearing, defense counsel elaborated that the decision to order a warrantless blood draw was analogous to the alleged use of excessive force in the officer-involved shooting.[6] Defense counsel also argued that Officer Tennis's police report regarding the shooting was inconsistent with his testimony at the hearing on the motion to suppress, and surmised that Tennis had been accounting for the events leading up to the officer-involved shooting. The trial court denied the motion as "fishing."

*2. Analysis*

Section 832.7, subdivision (a) provides that the personnel records of a police officer are "confidential," and "shall not be disclosed in any criminal or civil proceeding," except in compliance with Evidence Code sections 1043 and 1046. Evidence Code section 1043, subdivision (a) requires a party seeking discovery of officer personnel records to file a motion seeking the documents, with notice to the government agency that has custody or control over them. The motion must include "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon

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[6] Defendant appears to abandon this argument on appeal.

reasonable belief that the governmental agency identified has the records or information from the records." (*Id.*, subd. (b)(3).) If the defendant establishes good cause, the trial court must conduct an in camera review of the requested documents to determine what information, if any, should be disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

Appellate courts have applied a two-step analysis for evaluation of whether a defendant has shown good cause for discovery. First, "a showing of good cause requires a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021.) Second, the defendant must show "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.* at p. 1025.) As our Supreme Court has explained, "a plausible scenario of officer misconduct is one that might or could have occurred." (*Id.* at p. 1026.) Put another way, "a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Ibid.*; accord *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72 [a defendant must "describe an internally consistent factual scenario of claimed officer misconduct"].) Depending on the circumstances of the case, a defendant's "simple denial of accusations in the police report" may be enough, or a defendant may present "an alternative version of what might have occurred." (*Garcia v. Superior Court, supra,* at p. 72; accord *Warrick, supra,* at p. 1026.)

Here, defense counsel's declaration was neither a "simple denial of accusations in the police report" nor "an alternative version of what might have occurred." (*Garcia v. Superior Court, supra,* 42 Cal.4th at p. 72; *Warrick, supra,* 35 Cal.4th at p. 1026.) The declaration did not propose any defense to the charged offenses nor articulate how the requested discovery would support any such defense. Instead, so far as Officer Tennis was concerned, the declaration simply averred: "Without consent or a warrant, Officer

Tennis obtained a blood sample from [defendant]." Thus, the declaration merely alluded to defendant's argument that the warrantless blood draw constituted an unlawful search and seizure. That argument, which had already been adjudicated by the time the *Pitchess* motion was heard, had no obvious connection to any other defense theory, and defense counsel readily acknowledged that he could not articulate any theory of admissibility for evidence concerning Tennis's alleged role in the officer-involved shooting.[7] The trial court reasonably determined that defendant failed to show good cause for discovery of Tennis's personnel records.

Defendant argues that Senate Bill No. 1421 (2017-2018 Reg. Sess.) and Assembly Bill No. 748 (2017-2018 Reg. Sess.) compel discovery of Officer Tennis's personnel file. Effective January 1, 2019, Senate Bill No. 1421 amended sections 832.7 and 832.8 to provide public access to certain officer personnel records without the necessity of bringing a *Pitchess* motion. (See Stats. 2018, ch. 988, §§ 2 & 3, eff. Jan. 1, 2019; see also § 832.7, subd. (a).) Assembly Bill No. 748, which also became effective January 1, 2019, amends the California Public Records Act (Gov. Code, § 6250 et seq.) to require agencies to produce video and audio recordings of "critical incidents," defined as incidents involving the discharge of a firearm at a person by a peace officer, or incidents in which the use of force by a peace officer results in death or great bodily injury. (See Stats. 2018, ch. 960, § 1, eff. Jan. 1, 2019; see also Gov. Code, § 6254, subd. (f)(4)(C)(i)-(ii).)

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[7] We assume without deciding that records reflecting events or transactions postdating the charged offenses are, in theory, discoverable by means of the *Pitchess* procedure. (But see Evid. Code, § 1045, subd. (b)(1) [excluding information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in which discovery or disclosure is sought from the definition of relevant information].)

Defendant does not argue that Senate Bill No. 1421 or Assembly Bill No. 748 apply retroactively, or otherwise authorizes posttrial discovery, and we will not make such arguments for him. We therefore reject the claim of error without considering the effects of the new laws, if any, on existing *Pitchess* jurisprudence. (See generally *Association for Los Angeles Deputy Sheriffs v. Superior Court of Los Angeles County* (2019) 8 Cal.5th 28, 46 [noting that "Senate Bill 1421 does not 'affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code.' [Citation.] Nor does it "supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with [Evidence Code] Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in *Pitchess*"].)

*E. Senate Bill No. 1393*

Defendant argues that Senate Bill No. 1393 requires remand so the trial court may consider whether to exercise its newly authorized discretion to strike the prior serious felony conviction enhancement. We agree.

At the time of defendant's sentencing hearing on December 1, 2017, section 1385, subdivision (b) provided: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (former § 1385, subd. (b).) This provision was deleted by Senate Bill No. 1393, which was enacted on September 30, 2018, and became effective on January 1, 2019. (Stats. 2018, ch. 1013, § 2.) As amended, section 1385, subdivision (b) gives the trial court discretion to dismiss or strike a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) As a result, the trial court is no longer prohibited from striking prior serious felony convictions during sentencing.

The People agree that Senate Bill No. 1393 applies retroactively to defendant's case, which was not yet final as of January 1, 2019. (See *People v. Garcia*, *supra*, 28 Cal.App.4th at pp. 971-972 [Senate Bill No. 1393 "applies retroactively to all cases or

judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final when [it] becomes effective on January 1, 2019"].) However, the People contend that remand is unwarranted because the trial court's statements at the sentencing hearing show the court would not have exercised its discretion to strike the prior serious felony conviction enhancement even if it had the discretion to do so. We do not share the People's certainty.

Senate Bill No. 1393 is similar to Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended section 12022.53, subdivision (h) to provide that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (Stats. 2017, ch. 682, § 2; see also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079.) In *McDaniels*, the court held that a remand for resentencing under Senate Bill No. 620 was required "unless the record show[ed] that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*McDaniels, supra,* at p. 425.) In other words, "if ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." ' " (*Ibid*; see also *Romero, supra,* 13 Cal.4th at p. 530, fn. 13.) Here, the record does not clearly indicate the trial court would have declined to exercise its discretion to strike defendant's prior serious felony conviction enhancement.

Although the trial court denied defendant's *Romero* motion and remarked upon the seriousness of his current crimes and extensive criminal record, the court also found that defendant accepted responsibility for his actions and appeared to be genuinely remorseful. Based on these findings, the trial court exercised its discretion to select the midterm sentence for count 1, and one-third the midterm for count 2, resulting in a lower aggregate sentence than that requested by the prosecutor or recommended by the

probation department. We cannot say, on the record before us, that the trial court would not exercise its discretion to strike the five-year enhancement for defendant's prior serious felony conviction, if presented with the opportunity to do so. We therefore remand to allow the trial court to decide whether to exercise its discretion to strike the five-year enhancement imposed under section 667, subdivision (a), and if it does so, to resentence defendant. We express no opinion as to how the trial court should exercise its discretion on remand.

*F. Pretrial Mental Health Diversion*

Next, defendant argues that section 1001.36, which allows pretrial mental health diversion, applies retroactively to his case, and requires remand for a diversion hearing. The People respond that section 1001.36 operates prospectively only.

Courts of Appeal are divided on the question of retroactivity, which is now pending before the Supreme Court. (Compare *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted Dec. 27, 2018, S252220 (*Frahs*) [§ 1001.36 applies retroactively] and *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1121, review granted Oct. 9, 2019, S257049 with *People v. Craine* (2019) 35 Cal.App.5th 744, 760, review granted Sept. 11, 2019, S256671 [§ 1001.36 does not apply retroactively] and *People v. Torres* (2019) 39 Cal.App.5th 849, 856 [same].) Our Supreme Court will soon have the last word on the subject. In the meantime, we agree with the reasoning of *Frahs* and *Weaver* and conclude that section 1001.36 applies retroactively to cases, like defendant's, which were not final on appeal when the statute became effective on June 27, 2018.

The *Frahs* court adopted a conditional reversal and remand procedure which requires the trial court to "conduct a mental health diversion eligibility hearing under the applicable provisions of section 1001.36." (*Frahs, supra,* 27 Cal.App.5th at p. 792.) Following *Frahs,* we shall conditionally reverse the judgment and remand the matter to the trial court to allow it to conduct a mental health diversion eligibility hearing under section 1001.36. If, on remand, the trial court determines that defendant is ineligible for

mental health diversion pursuant to section 1001.36, or if defendant commits another crime or does not successfully complete diversion, then the court must reinstate defendant's convictions and the true findings on his sentencing enhancements. (*Frahs, supra,* at pp. 792, 796.)

*G. Cruel and Unusual Punishment*

As noted, defendant was sentenced as a third strike offender to a purported "aggregate determinate sentence of 24 years, followed by an indeterminate sentence of 25 years to life.[8] Defendant argues that his sentence amounts to cruel and unusual punishment in light of his mental illness. The People respond that defendant has forfeited the issue by failing to raise it in the trial court. We are inclined to agree with the People. (See *People v. Baker* (2018) 20 Cal.App.5th 711, 720 [cruel and unusual punishment claim is fact specific and forfeited if not raised in the trial court]; *People v. Johnson* (2013) 221 Cal.App.4th 623, 636 [forfeiture of cruel and unusual punishment claim].) But even assuming the claim was not forfeited, it would not succeed on the record before us.

The Eighth Amendment of the U.S. Constitution prohibits "cruel *and* unusual punishments," and has been read to contain a " 'narrow proportionality principle' " that forbids extreme sentences that are grossly disproportionate to the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20, italics added; see *Harmelin v. Michigan* (1991) 501 U.S. 957, 997 (conc. opn. of Kennedy, J.).) California's prohibition on "cruel *or* unusual punishment" (Cal. Const., art. I, § 17, italics added) has been read to bar any sentence " 'so disproportionate to the crime for which it is inflicted that it shocks the conscience

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[8] As we have suggested, the oral pronouncement of judgment was technically erroneous. We discuss the error at greater length momentarily. It is immaterial to the present discussion.

and offends fundamental notions of human dignity' " (*People v. Boyce* (2014) 59 Cal.4th 672, 721, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424, italics omitted).

California courts examine three criteria in assessing disproportionality: (1) the nature of the offense and offender, with emphasis on his danger to society; (2) the penalty imposed compared with the penalties for more serious crimes in California; and (3) the punishment for the same offense in other jurisdictions. (*People v. Christensen* (2014) 229 Cal.App.4th 781, 806-807.) Of these, defendant focuses solely on the first, omitting any discussion of the second and third criteria. We view defendant's omission as a concession that his sentence withstands constitutional scrutiny under the second and third criteria, and likewise focus on the nature of the offense and offender, with an emphasis on his danger to society.

Our Supreme Court has repeatedly rejected claims that a defendant's mental illness " 'place him in a category of offenders for whom capital punishment cannot be imposed,' *regardless* of the circumstances of the crime." (*People v. Boyce*, *supra*, 59 Cal.4th at p. 721 [rejecting claim that death penalty was disproportionate in light of defendant's schizotypal disorder and subaverage intelligence]; see also *People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1251, overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216 [rejecting claim that death penalty was disproportionate in light of defendant's bipolar and cyclothymic disorders].) In so doing, the court has also distinguished many of the cases on which defendant relies, most of which involve persons with intellectual disabilities (see *Atkins v. Virgina* (2002) 536 U.S. 304 [holding that the Eighth Amendment prohibits imposition of the death penalty on persons with intellectual disabilities]) or persons who were juveniles at the time of their offenses (see, e.g., *Roper v. Simmons* (2005) 543 U.S. 551 [the Eighth Amendment prohibits imposition of the death penalty on persons who were juveniles]). We need not cover the same ground. It is enough to note that no categorical rule exempts mentally ill offenders from the application of the death penalty. (*Boyce*, *supra*, at p. 722.) Instead, in assessing the

constitutionality of a death sentence on a mentally ill defendant, the court instructs that "we examine *the circumstances of the offense*, including the defendant's motive, the extent of his involvement in the crime, the manner in which it was committed, and the consequences of his acts, as well as the defendant's age, prior criminality, and mental capabilities." (*Id.* at p. 721.) We shall apply the same approach here.

Defendant was solely responsible for the current offenses. He got behind the wheel of a car after consuming alcohol and marijuana, drove recklessly down city streets, side-swiping A.P., running two red lights, and causing a terrible accident that killed Robinson and Hunt, and seriously injured the driver of the Camry. Although defendant has expressed remorse, his criminal history suggests the current offenses are merely the latest chapter in an ongoing struggle to conform his conduct to society's rules.

Defendant's criminal history begins with a juvenile adjudication for carjacking (§ 215) in 2000, when he was 17 years old. He then earned a misdemeanor conviction for making criminal threats (§ 422) in 2004, a felony conviction for theft and unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)) in 2005, and another misdemeanor conviction for battery on a spouse or cohabitant (§ 243, subd. (e)) in 2006. He then incurred two prior strike convictions, for robbery and attempted robbery (§§ 664/211), both involving violence against the victims, in 2008, followed by a felony vandalism conviction (§ 594, subd. (b)(1)) in 2011, and the current offenses in 2013. As the trial court observed, defendant's current offenses and criminal history evince a pattern of escalating violence, callousness, and disregard for the wellbeing of others, all of which support the conclusion that he poses a serious danger to society.

Defendant has served numerous jail and prison commitments and repeatedly violated probation and parole. Indeed, defendant appears to have been subject to continuous supervision by the criminal justice system for his entire adult life, and he was on parole at the time of the fatal accident. As the trial court observed, defendant's

ongoing criminality indicates that he has failed to learn from his past offenses, with tragic results.

Along the way, defendant has compiled an extensive mental health history, which includes an apparent diagnosis of bipolar disorder in 2010. Although defendant may suffer from significant mental health challenges, nothing in the record suggests they were a mitigating factor under California Rules of Court, rule 4.423, a mental or physical condition that significantly reduced culpability.[9] Nor does any evidence suggest that defendant's mental condition played a role in his decision to drive under the influence. (*People v. Boyce, supra,* 59 Cal.4th at p. 720 ["Although defendant offered evidence of his schizotypal disorder and subaverage intelligence, there was no evidence that either condition played any role in the killing"].) On the record before us, the trial court reasonably concluded, and we agree, that defendant's current offenses and criminal history reflect a pattern of serious and violent recidivism of the type the three strikes law was designed to address. Defendant does not challenge the three strikes scheme as unconstitutional, and we would reject such a challenge in any event. (See generally *Ewing v. California, supra,* 538 U.S. at pp. 24-31 [rejecting constitutional challenge to third strike sentence of 25 years to life for stealing three golf clubs]; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1422-1423 [rejecting constitutional challenge to third strike sentence of 25 year to life for stealing a magazine].) We likewise reject defendant's claim that his sentence was disproportionate in light of his mental illness.

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[9] Defendant was examined by two court-appointed psychologists pursuant to section 1027 before trial. Both determined that the current offenses were not caused or aggravated by defendant's mental condition. Defendant does not appear to have asked the trial court to revisit the psychologists' written reports at sentencing.

*H. Fines, Fees, and Assessments*

The trial court imposed various fines, fees, and assessments, including a restitution fine of $10,000 (§ 1202.4), a parole revocation fine of $10,000 (§ 1202.45), which the court stayed, restitution to the California Victim Compensation Board in the amount of $9,658.11 (§ 1202.4, subd. (f)), additional restitution in amounts to be determined, a $200 court operations assessment (§ 1465.8), a $150 court facilities assessment (Gov. Code, § 70373), a $283.22 main jail booking fee (Gov. Code, § 29550.2), and a $61.75 main jail classification fee (Gov. Code, § 29950.2). Relying on *Dueñas*, defendant argues the imposition of these fines, fees, and assessments without an ability-to-pay hearing was a violation of his right to due process and equal protection. The People respond that defendant forfeited his *Dueñas* challenge by failing to object in the trial court. We agree.

In *Dueñas*, the defendant was an indigent, homeless mother of two young children who was convicted of driving on a suspended license and sentenced to probation. (*Dueñas, supra,* 30 Cal.App.5th at pp. 1160-1161.) At her sentencing hearing, she objected that she was unable to pay the minimum statutory fees and fines and asked the trial court to set a hearing to determine her ability to pay. (*Id.* at p. 1162.) The trial court struck some fees, but imposed the court facilities and court operations assessments, ruling they were mandatory regardless of her inability to pay. (*Id.* at p. 1163.) On appeal, the *Dueñas* court found it was a violation of constitutional due process to impose the court assessments required by section 1465.8 and Government Code section 70373, neither of which was intended to be punitive, without finding that the defendant has the ability to pay them. (*Dueñas, supra,* at p. 1168.) The court also found that, although a restitution fine imposed under section 1202.4 was considered additional punishment for defendant's crime, that fine posed constitutional concerns because the trial court was precluded from considering ability to pay when imposing the minimum fine authorized by the statute. (*Dueñas, supra,* at pp. 1170-1171.) To avoid the constitutional problem, the court held that section 1202.4 requires a trial court to impose a minimum fine regardless of ability to

pay, but that execution of the fine must be stayed until the defendant's ability to pay is determined. (*Dueñas, supra,* at p. 1172.)

In this case, the trial court imposed the same court facilities and court operations assessments that were imposed in *Dueñas,* as well as other, more substantial, fines and fees. Unlike the defendant in *Dueñas,* however, defendant did not request a hearing regarding his ability to pay any fines or fees, or object to them on any factual or legal ground. Thus, he forfeited his claim that the fines should not have been imposed on him. (*People v. McCullough* (2013) 56 Cal.4th 589, 596-598 [appellate forfeiture rule applies to challenge to the sufficiency of evidence supporting a booking fee under Government Code section 29550.2, subdivision (a)]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [forfeiture rule applies to defendant's claim that restitution fine amounts to an unauthorized sentence based on his inability to pay]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [claim that trial court erroneously failed to consider ability to pay a restitution fine forfeited by failure to object]; *People v. Acosta* (2018) 28 Cal.App.5th 701, 705 [forfeiture rule applies to fines, penalty assessments, and administrative fees pursuant to § 290.3].)

Defendant argues his failure to object should not result in a forfeiture because *Dueñas* had not been decided at the time of his sentencing hearing. Defendant's argument misconstrues the nature of the forfeiture in this case. Forfeiture does not result from defendant's failure to anticipate the substantive due process analysis announced in *Dueñas* (but criticized in *People v. Hicks* (2019) 40 Cal.App.5th 320, 325-326, review granted Nov. 26, 2019, S258946), but rather from his failure to request a hearing or otherwise dispute his ability to pay. In contrast to *Dueñas*, defendant's ability to pay was a statutory consideration with respect to some of the most significant fees and fines imposed, including the $10,000 restitution fine. (See § 1202.4, subd. (d) [outlining factors the trial court must consider when setting the amount of a restitution fine above the $300 statutory minimum, including the defendant's "inability to pay"]; see also Gov.

Code, § 29550.2, subd. (a) [specifying that a judgment of conviction shall contain an order for payment of the amount of the booking fee "[i]f the person has the ability to pay"].) Unlike the defendant in *Dueñas*, he had a statutory right to an ability-to-pay hearing that he failed to exercise, thereby forfeiting his claim that such a hearing was required.[10] We therefore reject defendant's request that we remand for an ability to pay hearing.

*I. Custody Credits*

Finally, defendant argues the trial court erred in failing to award him custody credits for the 180 day period from November 9, 2013, to March 26, 2014, during which he was incarcerated for a parole violation. Defendant fails to demonstrate error.

Section 2900.5 governs the award of presentence custody credits. That section provides, in pertinent part: "(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody . . . all days of custody of the defendant, including days . . . credited to the period of confinement pursuant to Section 4019, . . . shall be credited upon his or her term of imprisonment . . . . [¶] (b) For purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subds. (a)-(b).)

Our Supreme Court has interpreted section 2900.5, subdivision (b) to mean, "a prisoner is not entitled to credit for presentence confinement unless he shows that the

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[10] *People v. Santos* (2019) 38 Cal.App.5th 923, on which defendant relies, is similarly distinguishable. There, the defendant objected to the proposed restitution fine based on his indigence. (*Id.* at p. 933.) The trial court reduced the fine to the statutory minimum, and the court of appeal concluded that the *Dueñas* issue had been preserved. (*Ibid.*) Here, by contrast, defendant made no such objections.

conduct [that] led to his conviction was the sole reason for his loss of liberty during the presentence period." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191 (*Bruner*).) Thus, presentence custody credits should be denied towards a new term when such custody is "attributable to a parole revocation caused in part, but not exclusively, by the conduct that led to the new sentence." (*Id*. at pp. 1182-1183.) To be entitled to presentence custody credits, a defendant must establish that "the conduct [that] led to the sentence was a dispositive, or 'but for' cause of the presentence custody." (*Id.* at p. 1180.)

The Court of Appeal for the Fourth Appellate District considered "how the *Bruner* 'but for' test should be applied when a defendant engages in a course of illegal conduct, such as drunk driving, that encompasses certain independent acts, none of which would be illegal per se, but each of which happens to be a separate ground for a parole violation, such as driving (without parole officer permission), or consuming alcoholic beverages in any amount" in *People v. Stump* (2009) 173 Cal.App.4th 1264, 1271. The defendant in *Stump* violated the terms of his parole in three ways: (1) by driving under the influence of alcohol or drugs; (2) by violating a special condition prohibiting alcohol consumption; and (3) by violating a special condition prohibiting the operation of a motor vehicle without a parole officer's approval. (*Id.* at p. 1267.) The court found that the defendant had not shown that "but for" having driven under the influence of alcohol, he would not have been held in custody for the period in question. (*Id.* at p. 1266.) The court explained: "In the case before us, the conduct for which defendant was arrested gave rise to two drunk driving charges (violations of Veh. Code, § 23152, subds. (a), (b).) It is not the case that 'but for' a drunk driving charge defendant would have been free of parole revocation custody. He still would have been held for driving, which is not necessarily a crime in and of itself but may be, and was here, a parole violation. Likewise, he still would have been held for consuming alcohol, which is not necessarily a crime in and of itself but may be, and was here, a parole violation. [¶] [] 'section 2900.5 did not intend to allow credit for a period of presentence restraint unless the *conduct* leading to the

sentence was the *true and only unavoidable basis* for the earlier custody.' (*Bruner, supra,* 9 Cal.4th at p. 1192.) Here, the conduct of driving under the influence of alcohol, for which defendant was sentenced in the underlying action, was not the 'only unavoidable basis' for the custody. The act of driving without permission was a basis for the earlier custody. The act of drinking alcohol, irrespective of driving, was a basis for the earlier custody. ' "Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." ' " (*Id.* at p. 1273.)

As noted, we have been provided with no information concerning the terms of defendant's parole. Although defendant argues his parole revocation is "based entirely on the charges in the present case," the record before us does not allow us to determine whether he would have been in custody "but for" the conduct that led to the instant convictions. We therefore conclude that defendant has failed to demonstrate he is entitled to the claimed credits.

*J. Sentencing Error*

As noted, the trial court sentenced defendant to a midterm sentence of six years for count 1, doubled for the strike, with a consecutive one-third the midterm of two years, doubled, for count 2, resulting in a total sentence of 16 years for counts 1 and 2, before enhancements. The trial court then sentenced defendant to an indeterminate sentence of 25 years to life for count 3. Although the great bodily injury enhancement was attached to count 3, the trial court added three years for the great bodily injury enhancement to the sentence for counts 1 and 2, together with five years for the prior serious felony enhancement, resulting in a purported "aggregate determinate sentence of 24 years, followed by an indeterminate sentence of 25 years to life."

The trial court erred in separating the great bodily injury enhancement from count 3. The three year sentence for the great bodily injury enhancement should have been added to the indeterminate sentence for count 3, resulting in an aggregate determinate

sentence of 21 years, followed by an indeterminate sentence of 28 years to life. We remand for resentencing on the great bodily injury enhancement.

## III. DISPOSITION

The judgment is conditionally reversed. The matter is remanded to the trial court with directions to hold a diversion eligibility hearing under section 1001.36. If the trial court finds defendant eligible under that statute, it may grant diversion. If defendant then satisfactorily performs in diversion, the trial court shall dismiss the charges. (§ 1001.36, subd. (e).) However, if the trial court does not grant diversion, or the court grants diversion but defendant fails to satisfactorily complete it (§ 1001.36, subd. (d)), then the court shall reinstate defendant's convictions and conduct further sentencing proceedings as appropriate.

The trial court is further directed to decide, at a hearing at which defendant has the right to be present with counsel, whether it will exercise its discretion to strike the prior serious felony conviction enhancement imposed pursuant to section 667, subdivision (a). If the trial court decides to strike the enhancement, defendant shall be resentenced and the abstract of judgment amended accordingly and forwarded to the Department of Corrections and Rehabilitation. If the trial court decides not to strike the enhancement, defendant's original sentence shall remain in effect.

Finally, the trial court is directed to resentence defendant on the great bodily injury enhancement, prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

/S/

RENNER, J.

I concur:

/S/

RAYE, P. J.

BUTZ, J., Concurring and Dissenting.

I concur in all parts of the Discussion except the majority's analysis in part F. (Maj. opn. *ante*, at pp. 28-29.) As to part F, I dissent.

A jury convicted defendant in May 2017 of two counts of gross vehicular manslaughter while intoxicated, one count of driving under the influence of alcohol and/or drugs causing injury, one count of misdemeanor hit and run with damage to property, and one misdemeanor count of driving without a valid driver's license. (Maj. opn. *ante*, at pp. 1-2.) The underlying incident occurred in early November 2013, more than six years ago. Defendant was sentenced on December 1, 2017, to a lengthy third strike sentence.

Effective June 27, 2018, the Legislature created a "pretrial" diversion program for defendants with diagnosed and qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder (PTSD). (Pen. Code, § 1001.36.)[11] Defendant contends the judgment must be conditionally reversed and the matter remanded to the trial court to determine whether he is eligible for diversion under section 1001.36. In support of his contention, defendant relies on the retroactivity rules of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*), as explained in *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted December 27, 2018, S252220 (*Frahs*). The majority agrees the statute operates retroactively and that defendant is entitled to a conditional reversal to make his case for diversion. I respectfully disagree.

Courts are divided as to whether section 1001.36 applies retroactively to cases not yet final on appeal under *Estrada* and *Lara*. (Compare *Frahs, supra,* 27 Cal.App.5th 784, rev. granted, *People v. Weir* (2019) 33 Cal.App.5th 868, review granted June 26,

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[11] Undesignated statutory references are to the Penal Code.

2019, S255212, *People v. Weaver* (2019) 36 Cal.App.5th 1103, review granted Oct. 9, 2019, S257049 (*Weaver*), *People v. Burns* (2019) 38 Cal.App.5th 776, review granted Oct. 30, 2019, S257738, and *People v. Hughes* (2019) 39 Cal.App.5th 886, review granted Nov. 26, 2019, S258541, with *People v. Craine* (2019) 35 Cal.App.5th 744, 749, review granted Sept. 11, 2019, S256671 (*Craine*), *People v. Torres* (2019) 39 Cal.App.5th 849, and *People v. Khan* (2019) 41 Cal.App.5th 460, review granted Jan. 29, 2020, S259498.)[12] As the majority appropriately acknowledges, the California Supreme Court will have the last word on this subject. (Maj. opn. *ante*, p. 28.) Until that time, I conclude, in agreement with *Craine*, that the statute does not have retroactive effect as to cases, like this one, that had already reached the stage of conviction (whether by jury or by plea) before the statute's effective date.

Section 1001.36 provides that a trial court, "[o]n an accusatory pleading alleging the commission of a misdemeanor or felony offense" (with exclusions not relevant here), may grant "pretrial diversion" to a defendant who meets all of the requirements specified in the statute. (§ 1001.36, subd. (a).) These include, among others, "a mental disorder . . . including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or [PTSD]," as established by "a recent diagnosis by a qualified mental health expert" (§ 1001.36, subd. (b)(1)(A)), and proof to the court's satisfaction that the mental disorder "was a significant factor in the commission of the charged offense" or "substantially contributed to the defendant's involvement in the commission of the offense." (§ 1001.36, subd. (b)(1)(B).)

" '[P]retrial diversion' " as used in the statute means "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).)

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[12] I may consider, as persuasive authority, the cases that have been granted review by our Supreme Court. (Cal. Rules of Court, rule 8.1115(e)(1).)

Here, defendant was convicted and sentenced before the statute's effective date. The majority concludes that the statute applies to him because it should be given retroactive effect. In support of their position, the majority relies on *Frahs* and *Weaver.* (Maj. opn. *ante*, at pp. 28-29.) For the reasons given in *Craine*, I conclude that *Frahs* was wrongly decided and the statute does not apply retroactively to persons, like defendant, "who have already been found guilty of the crimes for which they were charged." (*Craine, supra*, 35 Cal.App.5th at p. 754, rev. granted.) Likewise, I disagree with *Weaver's* conclusion that section 1001.36 applies retroactively. (*Weaver*, *supra*, 36 Cal.App.5th at pp. 1120-1121 ["we see nothing in the text of section 1001.36 sufficient to overcome the *Estrada* presumption"], rev. granted.)

The *Frahs* court decided whether section 1001.36 is retroactive by applying the standard retroactivity rules of *Estrada* and *Lara*. In *Estrada*, the court held that when the Legislature amends a criminal statute so as to lessen the punishment for the offense, it must be inferred that the Legislature's intent was to apply the lighter penalty to all cases not yet final. (*Estrada*, *supra*, 63 Cal.2d at pp. 745, 748.) In *Lara*, the court extended this rule to situations in which new legislation, though not lessening punishment, provides an " ' "ameliorating benefit" ' " for accused persons or constitutes an " 'ameliorative change[] to the criminal law.' " (*Lara*, *supra*, 4 Cal.5th at pp. 308, 309.) Taking these rules together, *Frahs* found that section 1001.36 confers an " 'ameliorating benefit' " on a class of accused persons and therefore must be understood to work retroactively. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, rev. granted.)[13]

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[13] *Lara* summarizes *Estrada*'s holding as follows: " 'The *Estrada* rule rests on *an inference that, in the absence of contrary indications*, a legislative body *ordinarily* intends for ameliorative changes to the criminal law to extend as broadly as possible . . . .' " (*Lara, supra*, 4 Cal.5th at p. 308, italics added.) *Lara* then concludes that neither the language of the initiative under consideration (Proposition 57) nor the ballot materials rebutted the inference that the initiative was intended to apply retroactively. (*Lara*, at p. 309.)

The *Frahs* court rejected the Attorney General's argument that by expressly restricting its scope to the "postponement of prosecution . . . at any point in the judicial process from the point at which the accused is charged until adjudication" (§ 1001.36, subd. (c)), the statute set a temporal limit on its retroactive effect. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, rev. granted.) The court reasoned: "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate." (*Ibid.*)[14] Concluding the issue could be resolved by applying *Estrada* and *Lara* to the plain language of the statute, the *Frahs* court denied the Attorney General's request for judicial notice of the statute's legislative history. (*Frahs*, at p. 789, fn. 2.)

In *Craine*, however, the court held that the *Frahs* analysis was flawed because it did not pay sufficient attention to how section 1001.36, subdivision (c), defines the timing of the "ameliorative benefit" it confers. In other words, *Frahs* did not properly consider either the phrase " 'postponement of prosecution' " or the phrase " 'until adjudication,' " instead relying only on a mechanical application of the *Estrada* and *Lara* rules. (*Craine*, *supra*, 35 Cal.App.5th at pp. 754-756, rev. granted.)

As to the phrase "until adjudication" (§ 1001.36, subd. (c)), *Craine* pointed out that " '[t]he purpose of [diversion] programs [in the criminal process] is precisely to *avoid* the necessity of a trial.' [Citation.]" (*Craine*, *supra*, 35 Cal.App.5th at p. 755, rev.

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In quoting *Lara*, the *Frahs* court omits the qualifying language I have italicized. Thus, *Frahs* in effect mischaracterizes the *Estrada/Lara* rule as one that applies automatically to all legislation conferring an "ameliorating benefit" on persons charged with crimes, regardless of any " 'contrary indications'" (*Lara*, *supra*, 4 Cal.5th at p. 308) in the legislation on its face or the legislative history (*Frahs*, *supra*, 27 Cal.App.5th at p. 790, rev. granted).

[14] *Frahs* did not address the first part of the statutory language quoted by the Attorney General (which is misstated as " ' "postponement *or* prosecution" ' "). (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, italics added, rev. granted.)

granted.) In other words, absent clear statutory language showing otherwise, it makes no sense to say that a defendant can be given the benefit of "pretrial diversion" after a case has already gone through trial to conviction (or its equivalent, a guilty or no contest plea). (*Id*. at pp. 755-756.)

By the same token, the meaning of the phrase "the postponement of prosecution" (§ 1001.36, subd. (c)) depends on the normal usage of "prosecution" in the criminal process: " ' "[t]he proceeding by which a party charged with a public offense is accused and brought to trial and punishment. [Citations.]" ' " (*Craine*, *supra,* 35 Cal.App.5th at pp. 755-756, rev. granted.) "A prosecution 'commences when the indictment or information is filed in the superior court and normally continues until . . . the accused is "brought to trial and punishment" or is acquitted.' " (*Id.* at p. 756.)

Therefore, "[p]ursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone." (*Craine, supra,* 35 Cal.App.5th at p. 756, rev. granted.)

According to *Craine*, *Lara* is distinguishable because the ameliorative benefit discussed there (the initial processing of accused juveniles in juvenile court, and trial in adult court only upon transfer) did not create a temporal bar to retroactive relief, as does section 1001.36. (*Craine, supra,* 35 Cal.App.5th at pp. 756-757, rev. granted.)

*Craine* also examines the legislative history of section 1001.36 (which *Frahs* refused to consider) and finds that it points to the same conclusion. The history makes clear that the statute was intended to make it possible to use early intervention wherever possible, partly " 'to avoid unnecessary and unproductive costs of trial and incarceration.' " (*Craine, supra,* 35 Cal.App.5th at pp. 758-759, italics omitted [quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, pp. 2-3], rev. granted.)

As *Craine* points out: "Early intervention cannot be achieved after a defendant is tried, convicted, and sentenced. The costs of trial and incarceration have already been incurred. Moreover, because mental health diversion is generally only available for less serious offenses, the reality is many defendants would already be eligible for parole or some other form of supervised release by the time their cases were remanded for further proceedings. Since mental health services are already available to parolees . . . , it is hard to imagine the Legislature intended for additional court resources and public funds to be expended on 'pretrial diversion' assessments at such a late juncture." (*Craine*, *supra*, 35 Cal.App.5th at p. 759, fn. omitted, rev. granted.)

For all the reasons stated in *Craine*, I disagree with *Frahs* and *Weaver* and find that "pretrial diversion" under section 1001.36 is not available to defendant because he has already been tried, convicted, and sentenced.

/S/

BUTZ, J.